UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

GENERAL MOTORS, LLC

Respondent

and **CASE 07-CA-053570**

MICHAEL ANTHONY HENSON, an Individual

Charging Party

BRIEF IN RESPONSE TO THE EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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The undersigned, on behalf of Respondent General Motors LLC, pursuant to § 102.46 of the Board's Rules and Regulations, respectfully submits this Brief in Response to the Exceptions of Counsel for the Acting General Counsel to the Administrative Law Judge's decision, dated May 30, 2012.

I. Introduction

With the global explosion in use of social media communications sites such as Facebook, LinkedIn and Twitter, many employers including the Respondent, General Motors LLC ("GM" or "Company"), have implemented employment policies to provide guidance to their employees with respect to the appropriate use of social media communications tools. Such policies, including the GM EMPLOYEE AND REPRESENTATIVE SOCIAL MEDIA POLICY ("Social Media Policy" or "Policy"),[1] are designed to promote the legitimate business objectives of these

[1] GM's Social Media Policy was offered and admitted into evidence at the March 15, 2012 hearing as GC Exhibit 1(h), Exhibit A. References to GM's Social Media Policy herein are cited as ("Policy, p. __").

employers and to minimize potential liabilities under numerous federal and state laws, ranging from securities laws to employment discrimination statutes to intellectual property rights.

In the Complaint in this unfair labor practice case, the Counsel for the Acting General Counsel ("AGC") alleges that GM's Social Media Policy is, in certain respects, ambiguous or overly broad and, therefore, violative of Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act"). Significantly, the AGC concedes that the Social Media Policy was not implemented in response to protected concerted activities by GM employees, nor has the Policy been enforced against employees engaging in such activities. (Tr. 17, 56).[2] Instead, the crux of the AGC's unfair labor practice claims is that GM's employees -- the overwhelming majority of which are represented by labor unions -- would construe the terms of the Policy as limiting their rights to engage in activities protected by Section 7 of the Act. (Tr. 9-10).

After a March 15, 2012 hearing on the merits, the AGC was only partially successful in her facial challenge to GM's Social Media Policy. In a May 30, 2012 decision (the "ALJD"), Administrative Law Judge Ira Sandron (the "ALJ") concluded that only one part of one provision in the Policy entitled "*Use Good Judgment about What You Share and How You Share*" violates Section 8(a)(1) of the Act. (ALJD, pp. 5-6).[3] In reaching this conclusion, the ALJ picked apart individual phrases in the Social Media Policy, and evaluated each provision separately, reading these provisions out of context without regard for the legitimate purposes of the Policy. Consequently, GM filed its own Exceptions to the ALJD, requesting that the unfair labor practice

[2] All references to testimony adduced at the March 15, 2012 unfair labor practice hearing are to the official transcript and are cited as ("Tr. ___").

[3] The ALJ held that the provisions in this section of the Social Media Policy concerning the use of GM's "logos, trademarks and other assets" do not violate the Act. (ALJD, pp. 6-7). In Exception No. 8, the AGC excepts to this conclusion, arguing that "GM is not permitted to hinder § 7 rights by overzealously guarding its intellectual property rights." (AGC Exceptions Brief, p. 12).

determinations made by the ALJ be reversed, and that the Board confirm that GM's Social Media Policy as a whole is completely lawful and does not inhibit employees in the exercise of their Section 7 rights.

In her Exceptions, the AGC seeks to compound the errors made by the ALJ in partially invalidating GM's Social Media Policy, contending that several other provisions of the Policy that the ALJ concluded were lawful actually violate Section 8(a)(1) of the Act. The AGC contends that these provisions, entitled "*Treat Everyone with Respect*," "*Personal References on Social Media Sites*," and "*Internal Social Media*" are also "facially overly broad and therefore violative of the Act." (AGC Exceptions Brief, p. 5). In support of her Exceptions, the AGC urges the Board to further dissect GM's Social Media Policy, read individual provisions out of context and ignore the legitimate reasons for the implementation of such a Policy. At the same time, the AGC argues that the Board should assume the worst regarding the scope and application of the Policy rather than read it in context, because "GM did not seek to introduce the [Company's] Corporate Policy Manual, any pre-existing 'old rules,' or any rules that may have issued subsequently" to provide context for the interpretation of the provisions of the Policy. (Id. at 9). However, in her zeal to invalidate additional provisions of the Social Media Policy, the AGC conveniently ignores that obvious fact that the government bears the *burden of proof* to establish that GM's Social Media Policy violates the Act, and the fact that the AGC repeatedly objected to the admission of *any evidence* outside the four corners of the Policy to establish the scope and application of the Policy. The AGC cannot, on the one hand, object to such evidence as irrelevant at the hearing and then later argue, on appeal, that the Company's failure to present the excluded evidence somehow supports an unfair labor practice finding. The AGC simply cannot have it both ways.

Contrary to the assertions in her Exceptions Brief, the absence of evidence regarding the scope and application of the Policy undermines rather than supports the AGC's unfair labor practice claims. Indeed, the Board cannot *presume* that GM's Social Media Policy would be applied to inhibit Section 7 activities when the language itself is facially neutral, nor can the Board *speculate* that employees would understand the provisions of the Policy to limit Section 7 activities when the Policy expressly provides that they do not. Instead, the NLRB must evaluate the Social Media Policy in its entirety, read all of the provisions of the Policy in concert and in context, and determine whether a reasonable employee would understand the Policy to limit his or her rights to engage in activities protected by Section 7 of the Act. Viewed through this prism, GM's Social Media Policy is not facially violative of the Act. On its face, GM's Social Media Policy provides reasonable guidelines for employee use of social media tools, and expressly protects the rights of employees to utilize these tools for purposes protected by the NLRA. No reasonable employee reading this Policy would construe the language to prohibit Section 7 activities. For these reasons, the AGC's Exceptions must be overruled in their entirety.

II. **Factual Background**

GM's Social Media Policy is merely an extension of the Company's pre-existing work rules and employment policies pertaining to employee conduct into the new realm of social media communications. Following the Company's bankruptcy reorganization in 2009, GM developed and implemented new communications channels to provide its workforce with more opportunities to engage with each other through various methods of electronic communication, including social media platforms. (Tr. 39-40). As a result, GM employees can now, among other things, participate in online discussions and join affinity groups on Overdrive, an internal

blogging tool owned and maintained by GM.[4] (Tr. 39). In connection with its employee empowerment efforts, GM promulgated a Social Media Policy in January 2011 to provide guidance to its employees, contractors, and representatives regarding their use of social media tools. (Tr. 56). The Policy, which is global in nature, was distributed through the Company intranet, by e-mail, and in its daily e-newsletter. (Tr. 22). All GM employees -- including its employees represented by the UAW, IAM, IBEW, and IUOE -- have access to the Company intranet. (Tr. 22, 100).

The Policy is three (3) pages long and expressly incorporates by reference existing GM policies. It also refers readers to the general Corporate Policy Manual for more information:

> This Social Media Policy can be summarized as "New Tools, Old Rules," since it is really a summary of existing GM policies and how they apply to GM employees and representatives (agencies, contract and fee-for-service workers) who participate in social media. See the Corporate Policy Manual for all GM Policies.

(Tr. 55-56; Policy, p. 1). The Policy also contains a prominent disclaimer. As can be seen, the disclaimer makes clear that the entire Social Media Policy will be construed and administered in accordance with all applicable laws, *including Section 7 of the Act*:

> GM's Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act). GM reserves the right to amend, modify, suspend or terminate this Policy at any time and in its sole discretion without prior notice.

(Policy, p. 3). The Policy applies to social media platforms, such as Overdrive, Facebook, Twitter, and Google Plus. (Tr. 24). However, the Social Media Policy does not apply to e-mail communications. (Id.)

[4] The AGC asserts in her Exceptions Brief that "GM supervisors monitor the site daily." (AGC Exceptions Brief, p. 3). This assertion lacks evidentiary support. In fact, the evidence adduced at the hearing revealed something much less sinister, namely, that certain GM employees actively *manage* the site. (*See* Tr. 50) ("I have colleagues who manage it on a daily basis....")

On March 23, 2011, Michael Henson ("Henson" or "Charging Party"), a UAW-represented GM employee, filed an unfair labor practice charge (the "Charge") against the Company. In the Charge, Henson alleged that he was disciplined after he engaged in certain protected activities. The Charge was later amended to add the allegation that the Company's Social Media Policy is overbroad under the Act. Henson's unlawful discipline claim was eventually withdrawn, but the AGC continues to maintain that the Social Media Policy is facially unlawful. Notably, neither the AGC nor Henson have alleged that any GM employee was ever disciplined pursuant to the Social Media Policy. (Tr. 17).

A hearing was held on March 15, 2012 before ALJ Ira Sandron. Neither the Charging Party nor the UAW (nor any of the other unions representing GM employees) attended the hearing. (Tr. 6). At the hearing, the AGC explicitly conceded that she was proceeding under a single theory, namely, that the Policy is facially overbroad.[5] (Tr. 70). Significantly, the AGC offered absolutely no evidence to support her facial over breadth theory, nor did she call any witnesses to testify that their Section 7 rights have been chilled by the Policy. Moreover, no evidence was adduced at the hearing that GM implemented the Policy in response to Section 7 activity, or that GM possessed any anti-union animus in creating or promulgating the Policy. (ALJD, p. 2) ("The Acting General Counsel does not assert that GM promulgated any of its social media provisions because of an illegal motive or has applied them in violations of employees' Section 7 rights.")

[5] Notwithstanding her unequivocal concession at the hearing, the AGC makes the following assertion in her brief: "Significantly, whether any employee statement posted on GM Overdrive has ever been punished under the Policy was not revealed in the record." (AGC Exceptions Brief, p. 3). This assertion is disingenuous at best. As explained above, the AGC insisted at the hearing that she was proceeding *only* under the facial over breadth theory. (Tr. 70) ("We are proceeding on the facially [sic] over-breadth theory.") Moreover, it was the AGC's burden to prove that employees' Section 7 rights have been chilled by the Policy. The AGC failed to satisfy her burden.

In contrast to the utter lack of evidence offered by the AGC, GM called five (5) witnesses -- Mary Henige, David Elliott, Sharon Ridgell, Kristine Raad, and Timothy Gorbatoff -- to testify regarding the legitimate purposes of the Policy, the scope and application of the Policy and the fact that the Policy does not inhibit employees in the exercise of their Section 7 rights. Despite the AGC's numerous objections,[6] these witnesses provided unrebutted testimony regarding the scope of the Company's social media initiatives, the heavily unionized nature of GM's workforce, employees' awareness of their Section 7 rights,[7] the Company's legitimate efforts to protect the integrity of its valuable intellectual property, and its continuing respect for employees' Section 7 rights. (Tr. 19-90; 91-100; 102-12; 114-18; 119-36). After listening to the evidence and receiving the testimony, the ALJ upheld the vast majority of the Policy as lawful. However, the ALJ concluded that certain provisions relating to (1) the posting of confidential, non-public, and personal information, and (2) the posting of materials without prior permission or proper attribution are overbroad and violate Section 8(a)(1) of the Act.

III. **Arguments and Authorities**

Although the ALJ improperly parsed through the individual provisions of the Social Media Policy rather than evaluating the Policy holistically and in context, the ALJ correctly concluded that many portions of the Social Media Policy are entirely lawful. The AGC takes issue with these conclusions, requesting in her Exceptions that the Board find that additional provisions of GM's Social Media Policy violate Section 8(a)(1) of the Act. The AGC also takes

[6] The AGC objected thirty-one (31) times over the course of three-and-a-half hour hearing. (*See* Tr. 30, 33, 44-45, 49-51, 53-56, 58, 60-62, 73, 93-95, 97-98, 104-05, 112-14, 117-18, 120, 122, 132-33). Counsel's numerous objections and interruptions eventually prompted the ALJ to begin questioning Company witnesses directly. (*See* Tr. 133-34).

[7] GM witness Sharon Ridgell testified on cross-examination that the Company posted Section 7 rights notices at all of its U.S.-based facilities in 2010. (Tr. 106-11). The notice posting was undertaken pursuant to EXECUTIVE ORDER 13496, which requires federal contractors and subcontractors (e.g., GM) to post such notices.

issue with various rulings made by the ALJ during the hearing. Contrary to the arguments and assertions made by the AGC in her Exceptions, the ALJ's decisions with respect to these disputed matters are both consistent with applicable law and the evidence adduced at the March 15, 2012 hearing in this matter. Accordingly, the AGC's Exceptions must be overruled.

A. Contrary to the AGC's Argument, the Social Media Policy Must Be Construed and Evaluated Holistically (Exceptions 8, 9, 10, 11).

As an initial matter, under Board law, a facially neutral employment policy must be evaluated in its entirety and in context in order to determine whether the policy violates Section 8(a)(1) of the Act. In Exceptions 8-11, the AGC asks the Board to reverse the ALJ's conclusions with respect to certain provisions in GM's Social Media Policy by isolating certain portions of the Social Media Policy and evaluating them on a phrase-by-phrase basis without giving due consideration to the purposes of the Policy or to the context in which these phrases appear within the Policy. (AGC Exceptions, Nos. 8-11). In so doing, the AGC essentially asks the Board to "pars[e] the language" of GM's Social Media Policy and hold that certain phrases, when viewed in "isolation," violate Section 8(a)(1) of the Act. *See* Lafayette Park Hotel, 326 NLRB 824, 825-26 (1998); Tradesmen Int'l, 338 NLRB 460, 461 (2002). Both the Board and the Courts have repeatedly rejected such an approach. Instead, the Board *must* construe GM's Social Media Policy in its entirety and reject the AGC's Exceptions urging the Board to pick apart individual provisions of the Policy and evaluate these provisions on a phrase-by-phrase basis without considering the context of the language or the overall objectives of the Policy. When viewed in its entirety and in context, GM's Social Media Policy is neither overly broad nor ambiguous.

1. Well-Settled Law Requires the Board to Consider the Social Media Policy Holistically.

In evaluating employment policies such as GM's Social Media Policy, the NLRB applies an objective standard. In deciding whether an employment policy is lawful, the Board must look

to the policy as whole to determine "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 Rights." Lafayette Park Hotel, 326 NLRB at 825. Moreover, the Board must avoid reading phrases out of context and must not presume, absent explicit unlawful language, that a work rule violates Section 7 rights:

> In determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.

Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004) (internal citations omitted); Tradesmen Int'l, 338 NLRB 460, 462 (2002) (holding that the ALJ "improperly read[] the word 'positive' in isolation" without considering the meaning of the term in the context of the policy); Palms Hotel & Casino, 344 NLRB 1363, 1367 (2005) ("[T]he rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employees' rights is not to be presumed."); University Medical Center v. NLRB, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003) (reversing the Board and concluding that employer's policy prohibiting "other disrespectful conduct" was lawful); *see also* Id. at 1089 ("[T]o quote the Board itself in a more realistic moment, 'any arguable ambiguity' in the rule 'arises only through parsing the language of the rule, viewing the phrase . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights.'") (*quoting* Lafayette Park Hotel, 326 NLRB at 825).

Moreover, in those cases where a rule or policy does not explicitly restrict Section 7 rights, the Board should not invalidate a policy by inferring unlawful intent or conjuring up hypothetical situations under which the policy could conceivably be read to restrict protected activity. Id.; *see also* Palms Hotel & Casino, 344 NLRB at 1368 ("We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced

against it.") It is not the Board's function to engage in verbal gymnastics or to indulge in fanciful hypotheticals for the purpose of invalidating otherwise lawful policies promulgated by employers. Indeed, where a "rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." Lutheran Heritage Village-Livonia, 343 NLRB at 647 (emphasis in original); University Medical Center, 335 F.3d at 1088 (upholding a broad prohibition of disrespectful conduct where the rule "applies to incivility and outright insubordination, in whatever context it occurs" and was not specifically aimed at "union organizing activity"); Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB, 253 F.3d 19, 27 (D.C. Cir. 2001) ("It defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace.")

In his well-reasoned concurrence in Lafayette Park Hotel, former NLRB Chairman William Gould clearly articulated the dangers of parsing an otherwise valid rule or policy on a phrase-by-phrase basis to find highly attenuated, theoretical violations of the Act:

> My [dissenting] colleagues' findings that these rules are ambiguous demonstrates a failure to apply the appropriate standard to these rules. It is readily apparent from their opinion that they have viewed these rules through the eye of a sophisticated labor lawyer and have focused on whether any language in the rules could theoretically encompass Section 7 Activity. Their search for ambiguity in these rules, however, must begin with a focus on the obvious plain meaning of the language in the rule. When the obvious meaning of such rules is the promotion of civility and good manners, there is no basis to presume that a reasonable employee might parse out certain language . . . and assume that it applies to union organizing.
>
> . . .
>
> In short, it is not enough to find that certain language in a rule is broad enough to arguably apply to Section 7 activity. The

> appropriate inquiry must center on whether a reasonable employee could believe that the rule prohibits protected activity. When the rules have an obvious intent, they cannot be found unlawful by parsing out certain words and creating theoretical definitions that differ from the obvious ones. If that were the standard, virtually all of the work rules in today's workplace could be deemed violative of our Act unless they explicitly state that they do not apply to Section 7 activity. Such findings would clearly be inconsistent with the purposes of the Act.

Lafayette Park Hotel, 326 NLRB at 830 (Chairman Gould, concurring).

Here, the AGC does not argue in Exceptions 8-11 that the provisions of the Social Media Policy upheld by the ALJ specifically refer to Section 7 activity. Nor could she. To the contrary, the AGC's arguments depend on the strained reasoning that the provisions, when viewed in isolation, could be "reasonably" or "impliedly" read to forbid protected activity. (AGC Exceptions Brief, pp. 14, 16, 17, 19). This is precisely the sort of analysis that both the Board and the D.C. Circuit have repeatedly condemned as improper.

Here, the Board should not deconstruct the Social Media Policy to strike down individual provisions of the Policy based on speculative and wholly hypothetical determinations that an employee could somehow construe the Policy in a manner that would impair his or her Section 7 rights. To do so would ignore GM's well-founded right to promulgate rules protecting its legitimate business interests and ensuring that the Company complies with other requirements under federal law, including the requirement that the Company maintain a workplace free from unlawful harassment, discrimination, and intimidation. *See* Adtranz ABB Daimler-Benz Transp., 253 F.3d at 27 ("We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here . . . . Given this legal environment, any reasonably cautious employer would consider adopting [this] sort of prophylactic measure.") Instead, the Board must review the Social Media Policy holistically and consider the purposes behind the Policy when construing its language. As such,

the approach advocated in AGC's Exceptions 8-11 should be rejected as contrary to both law and logic.

2. The Social Media Policy Is Lawful When Reviewed Holistically.

Because the Social Media Policy on its face does not unlawfully restrict Section 7 Rights, in Exceptions 8-11, the AGC repeatedly asks the Board to conclude that certain phrases in the Policy are unlawful because they "reasonably" or "impliedly" could be read to forbid protected activity. (AGC Exceptions Brief, pp. 14, 16-17, 19). In doing so, the AGC willfully ignores all of the legitimate purposes served by the Policy and effectively reads the disclaimer provision out of the Policy, which expressly states that the Policy will be "administered in compliance with. . . . Section 7 of the NLRA." (Policy, p. 3). In short, the AGC seeks to turn the purposes of the Act on its head by obstructing the Company's fundamental right to promulgate reasonable employment policies aimed at ensuring compliance with applicable federal, state, and local laws and otherwise promoting harmony in its workforce.

a. The Policy, on its Face, Makes Clear That It Was Promulgated for Legitimate Reasons.

Neither the AGC nor the ALJ questioned the legitimate business reasons for the Company's implementation of the Social Media Policy. The primary purposes of the Policy are to provide guidance to employees regarding the appropriate use of social media communications, to encourage good judgment and civility in the use of these media, and to ensure compliance with applicable laws in connection with the use of social media by the Company's employees and agents. Further, the Company made perfectly clear that the Social Media Policy was an extension of existing work rules and employment policies, and that the Policy would be interpreted and applied in accordance with these existing rules and policies. Indeed, the first paragraph of the Policy makes clear that the purpose of the Social Media Policy is to

"summar[ize] existing GM policies and how they apply to GM employees and representatives … who participate in social media." (Policy, p. 1). The AGC does not even allege that GM's other lawful policies, all of which are incorporated by reference in the Social Media Policy, violate Section 7 of the Act. Nor has she even attempted to introduce GM's other policies into evidence. As such, there is no reason to conclude that the Social Media Policy restricts the Section 7 rights of the Company's employees. *See, e.g.*, Palms Hotel & Casino, 344 NLRB at 1368 ("We would not speculate that a reasonable reader of the rule would read the rule as applying to that situation."); Hyundai Am. Shipping Agency, 357 NLRB No. 80 *slip op.* at 2 (2011) ("[W]e find that employees would not reasonably construe the Respondent's rule against 'indulging in harmful gossip' to prohibit Section 7 activity.")

Moreover, a review of the Policy's provisions confirms the Company's legitimate objectives in promulgating the Social Media Policy. The Policy is clearly designed to assure minimum standards of decorum and civility in the use of social media communications tools. These objectives are completely appropriate and lawful. *See, e.g.*, Lafayette Park Hotel, 326 NLRB at 825 (noting that work rules are valid where they promote "legitimate business concepts"); Southwestern Bell Telephone Co., 200 NLRB 667, 670 (1972) (noting that work rules designed to promote "decorum and discipline" are valid). Indeed, the Policy's provisions are geared towards preventing harassment, protecting trade secrets, ensuring truthfulness and honesty, and using good judgment. Given that the Board may not invalidate facially neutral policies simply because they could -- under some hypothetical scenario -- infringe upon Section 7 rights, the Board must overrule Exceptions 8-11. *See* Adtranz ABB Daimler-Benz Transp., 253 F.3d at 27 (Board should not to construe "broad prophylactic rule[s]" to be unlawful simply because they could, in certain cases, infringe upon Section 7 rights.")

b. The Social Media Policy Is Lawful Because the Policy Clearly States That It Will Not Be Applied to Violate Employees' Rights Under the Act.

Although dismissed by both the AGC and ALJ, the express disclaimer set forth in GM's Social Media Policy extinguishes any doubts regarding whether the Policy is intended to apply to activities protected by Section 7 of the Act.[8] The disclaimer clearly and unambiguously states that GM's Social Media Policy will be administered in compliance with applicable laws and regulations, including Section 7 of the Act. (*See* Policy, p. 3). This language could not possibly be any clearer -- the Policy states on its face that it will not be administered to violate the law. Yet, the ALJ incorrectly concluded that the disclaimer should not be given any weight because "employees cannot be expected to know what conduct is protected under the Act and, as a result, may well choose to abstain from engaging in what is protected activity rather than risk engaging in unprotected activity and facing lawful discipline." (ALJD, p. 9). The ALJ's ruling constitutes reversible error for numerous reasons.

First, Board members have repeatedly counseled employers that they can avoid liability under the Act and insulate their policies from facial challenges by including disclaimers in employment policies clarifying that the policies will not be enforced to violate Section 7 rights. *See, e.g.,* Lutheran Heritage Village-Livonia, 343 NLRB at 652 n.7 (Members Liebman and Walsh, dissenting) ("Member Liebman observes that if the prohibited conduct is of a kind so general as to imply that protected activity may be encompassed, *an employer can easily eliminate the ambiguity by adding a statement to its rule that the prohibition does not apply to conduct that is protected under the National Labor Relations Act*.") (emphasis added); Safeway,

[8] In his decision, the ALJ concluded that the disclaimer language in the Social Media Policy was inadequate to cure any alleged over breadth in the Policy because "employees cannot be expected to know what conduct is protected under the Act…." (ALJD, p. 9). Given that the overwhelming majority of GM's employees are represented by labor unions, this "conclusion" is pure speculation and contrary to law. *See, e.g.,* Ark Las Vegas Restaurant Corp., 335 NLRB 1284, 1291 (2001).

Inc., 338 NLRB 525, 528 (2002) (Member Liebman, dissenting) (same); Palms Hotel & Casino, 344 NLRB at 1370 n.4 (Member Liebman, dissenting) ("[E]mployers might minimize facial challenges to their workplace rules by notifying employees of their rights under Sec. 7 of the Act and advising them that work rules [sic] are not intended, and should not be construed, to interfere with the employees' rights."); Lafayette Park Hotel, 326 NLRB at 830 (Chairman Gould, concurring) (noting that even if the NLRB could parse the language of policies to find violations where a policy could "arguably apply to Section 7 activity," that an employer may avoid liability by "explicitly stat[ing] that [the work rules] do not apply to Section 7 activity"). GM should not be penalized for following this well-reasoned guidance by the NLRB. Accordingly, the Board should give effect to all provisions in GM's Social Media Policy, and construe the disclaimer as a limitation on the remaining provisions of the Policy. If it does so, the Board cannot possibly find that the Policy infringes upon Section 7 rights.

Second, the cases cited by the ALJ in invalidating the disclaimer are all inapposite because they all arise from dissimilar circumstances. For example, in Ingram Book Co., 315 NLRB 515, 516 (1994), an employer's handbook provision restricting the distribution of literature was invalidated as overbroad, despite the fact that the handbook contained a disclaimer. However, Ingram Book Co. does not apply here because the employees in that case did not have the benefit of a bargaining representative to challenge their employer's policies and to answer employees' questions with respect to the meaning of those policies. *See* Id. at 517 (involving the interrogation of employees and statements by the employer that "no union was wanted or needed"). The remaining cases cited by the ALJ in his decision are also inapposite.[9] Indeed, the

[9] One case cited by the ALJ, Tower Industries Inc., 349 NLRB 1077, 1084 (2007), is distinguishable because it involved a waiver of Section 7 rights in a wage claim release agreement. The other case, McDonnell

NLRB has endorsed the proposition that where an employee could be uncertain about the meaning or scope of a rule, the Board will be less likely to find the rule unlawful where the employee is represented by a labor union:

> The real question is whether any employee, guided by knowledgeable union officials, would harbor uncertainty over the scope of the rule. I tend to doubt that there would be any uncertainty here. The Union is undoubtedly well aware of the limits of protected conduct and well aware that the Act permits conduct which could damage an employer's reputation insofar as employee treatment is concerned.

Ark Las Vegas Restaurant Corp., 335 NLRB at 1291.

The UAW, IAM, IBEW, and IUOE -- which together represent GM's employees covered by the Act -- are among the largest and most sophisticated unions in the country. (Tr. 98). Together, these unions have filed thousands of unfair labor practice charges (many of which have resulted in published decisions by the Board), in which the unions sought to enforce Section 7 rights on behalf of their members. As such, each union clearly has a deep institutional understanding of the concepts captured in the disclaimer provision. Accordingly, much like in Ark Las Vegas, and as distinguished from the cases cited by the ALJ, to the extent any doubt existed with respect to the meaning of the disclaimer, employees could have raised such questions and issues through their designated collective bargaining representatives.[10] For this reason as well, the disclaimer mandates a finding that the Policy complies with Section 7.

(continued…)

Douglas Corp., 240 NLRB 794, 802 (1979), involved the challenge of a work rule that had been the subject of two (2) prior Board orders.

[10] Significantly, while the UAW, IAM, IBEW, and IUOE were almost certainly aware of the Policy, which became effective in January 2011, and was distributed to employees by email, communicated in a daily e-newsletter, and posted on the Company intranet, there is no evidence in the record that any union has ever challenged the Social Media Policy on the grounds that it infringes upon its members' Section 7 rights. Moreover, no grievances have been filed with respect to the application or enforcement of the Social Media Policy. (Tr. 97). Significantly, none of these unions elected to join these proceedings as a party.

Third, the ALJ's conclusion that "employees cannot be expected to know what conduct is protected under the Act and, as a result, may well choose to abstain from engaging in what is protected activity rather than risk engaging in unprotected activity and facing lawful discipline" ignores the fact that GM posted a compulsory notice explaining employees' Section 7 rights to them in 2010. (Tr. 105, 110-11). At the hearing, GM offered uncontradicted and credible testimony that the Company has explained to its employees the meaning of Section 7 by posting notices of employee rights under the Act.[11] (Id.) The NLRB, in its recent Notice of Proposed Rulemaking, endorsed notice posting as a particularly effective method for informing employees of their rights under the Act:

> If employees are largely unaware of their NLRA rights, however, one reason surely is that, except in very limited circumstances, no one is required to inform them of those rights . . . . Informing employees of their statutory rights is central to advancing the NLRA's promise of full freedom of association, self-organization, and designation of representatives of their own choosing. It is fundamental to employees' exercise of their rights that the employees know both their basic rights and where they can go to seek help in understanding those rights. Notice of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activities, and to refrain from such activities, and information pertaining to the Board's role in protecting statutory rights serves the public interest.

PROPOSED RULES GOVERNING NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT, 75 Fed. Reg. 80410, 80412 (Dec. 22, 2010) (*to be codified at* 29 C.F.R. pt. 104) (internal quotations and citations omitted). Here, it is undisputed that GM has posted

[11] In her Exceptions, the AGC urges the Board to give no weight to the undisputed evidence adduced at the hearing establishing that the Company has posted Notices of Section 7 Rights for its employees. (Tr. 105, 107, 110-11); (AGC Exceptions Brief, pp. 21-22). The AGC is apparently unaware of the fact that federal contractors and subcontractors, like GM, pursuant to EXECUTIVE ORDER 13496, were required to post notices of employees' rights under the NLRA in 2010. Accordingly, Sharon Ridgell's testimony regarding the notice posting is entirely consistent with GM's compliance with its legal obligations. In any event, because the AGC did not call a witness to testify that the Company did *not* post notices informing employees of their Section 7 rights, the unrebutted testimony adduced by GM must be credited.

notices to employees explaining their rights under the NLRA.[12] Under such circumstances, the ALJ should have given weight to the disclaimer's plain meaning. If he had done so, the Social Media Policy would have been upheld in its entirety.

Finally, the ALJ's failure to give weight to the disclaimer's plain meaning, especially in light of GM's Section 7 postings at its facilities, requires one to surmise that Section 7 is unconstitutionally vague. (Tr. 105, 107, 110-11). That is, the ALJ is essentially concluding that employees will not understand Section 7, even where GM has specifically written in its Policy that the Policy will be administered in compliance with Section 7 of the NLRA, and where GM has posted Section 7 notices describing Section 7 rights. (*See* ALJD, p. 9). Accepting the ALJ's conclusion jeopardizes any enforcement of the NLRA in any case because his position is essentially an admission that no reasonable person, by reference to the Act, can understand rights or protections conferred by its plain terms. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). Accordingly, by accepting this conclusion, due process is denied in any enforcement action and the Act becomes unconstitutionally vague.

[12] Any suggestion that the disclaimer should have included additional explanations regarding employees' Section 7 rights is not supported by law. The Board has expressly cautioned employers that excessive detail in notice postings and similar policies would unnecessarily confuse employees. *See* Lafayette Park Hotel, 326 NLRB at 826 (policies require a "common sense formulation" and need not "set forth an exhaustive[] comprehensive rule anticipating any and all circumstances"); *see also* PROPOSED RULES GOVERNING NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT, 75 Fed. Reg. 80410, 80412 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104) ("The Board has carefully reviewed the content of the notice required under the Department of Labor's final rule, which was modified in response to comments from numerous sources, *and has tentatively concluded that that notice explains employee rights accurately and effectively without going into excessive or confusing detail*.") (emphasis added). The Social Media Policy, which is three pages long, was drafted with a view toward readability and ease of understanding by employees.

B. The ALJ Correctly Determined that Certain Provisions of the Social Media Policy Do Not Violate Section 8(a)(1) of the Act (Exceptions 8, 9, 10, 11).

1. The ALJ Correctly Determined that the Provisions of the Social Media Policy Regarding "Offensive, Demeaning, Abusive, or Inappropriate Remarks" Do Not Violate the Act (Exception 9).

Even assuming for the purposes of argument that applicable law permitted the ALJ to evaluate GM's Social Media Policy a provision-by-provision basis (it does not), the ALJ nevertheless correctly concluded that the overwhelming majority of the provisions in GM's Social Media Policy are entirely lawful. The AGC contests these findings. For example, in Exception No. 9, the AGC objects to the ALJ's conclusion that the following provision in the Social Media Policy does not violate Section 8(a)(1) of the Act:

> **TREAT EVERYONE WITH RESPECT**
>
> It's just the right thing to do, no matter what. Someone can form an impression about you or the Company based on your behavior online or offline. Remember that customers, colleagues, supervisors, suppliers and competitors may have access to whatever you post. These individuals reflect a diverse set of customs, values and viewpoints. Offensive, demeaning, abusive or inappropriate remarks are as out-of-place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.

(Policy, p. 2; ALJD, pp. 7-8). In support of this Exception, the AGC asserts that "employees will likely read this section of the Policy to proscribe a wide spectrum of communications including protected criticisms of GM's labor policies or treatment of employees." (AGC Exceptions Brief, pp. 14-15).

As an initial matter, the ALJ's conclusion with respect to this provision of the Social Media Policy is well-supported by extant law. In general, work rules prohibiting offensive, demeaning, abusive, or other similar language in the workplace are not facially invalid under Section 8(a)(1) because employers have a legitimate interest in establishing a "civil and decent

work place," and ensuring proper "decorum and discipline" among their employees. Lutheran Heritage Village-Livonia, 343 NLRB at 647 (*citing* Adtranz ABB Daimler-Benz Transp., 253 F.3d at 19); Southwestern Bell Telephone Co., 200 NLRB at 670. Moreover, the NLRB upheld as lawful similar rules prohibiting:

> Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of a resident's family, or any other person on Company property.

Lutheran Heritage Village-Livonia, 343 NLRB at 647, and:

> [A]ny type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team members of patrons.

Palms Hotel & Casino, 344 NLRB at 1367-68. The Board has also recognized that:

> [E]mployers have a legitimate right to adopt prophylactic rules banning such [abusive] language because employers are subject to civil liability under Federal and State law[13] should they fail to maintain "a workplace free of racial, sexual, and other harassment" and "abusive language can constitute verbal harassment triggering liability under state or federal law." … In addition, … there is no basis for finding that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity. (citations omitted)

Lutheran Heritage Village-Livonia, 343 NLRB at 647 (*citing* Adtranz ABB Daimler-Benz Transp., 253 F.3d at 25-27). The ALJ's decision was consistent with this well-established precedent.

[13] Indeed, federal antidiscrimination law *requires* employers to establish such policies. In particular, Title VII of the Civil Rights Act of 1964 prohibits, among other things, harassment in the workplace based on race, religion, sex, or national origin. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (explaining that a discriminatorily abusive or offensive work environment is actionable under Title VII). Under Supreme Court precedent, an employer may establish an affirmative defense to a hostile work environment claim only if it has promulgated and enforced a policy prohibiting harassment. *See* Farragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998). As a result, an employer that does not promulgate policies prohibiting offensive, demeaning, abusive, or other similar language in the workplace acts at its own peril. Moreover, because of its status as a federal contractor, GM is similarly required to maintain effective policies to guard against the creation of a hostile work environment. *See* EXECUTIVE ORDER 11246.

The AGC's arguments to the contrary are unconvincing. In support of Exception No. 9, the AGC incorrectly asserts that: (1) the terms "offensive, demeaning, abusive or inappropriate" are vague and employees would likely read this language "to proscribe a wide spectrum of communications, including protected criticisms of GM's labor policies or treatment of employees"; and (2) GM presented no evidence that the Company has offered employees any guidance on how this section of the Policy will be reconciled with their Section 7 rights. Both arguments are specious and must be rejected.

First, the terms used in GM's Social Media Policy are not impermissibly vague or ambiguous. As noted above, the NLRB has held that policies utilizing similar terms are lawful. *See, e.g,.,* Lutheran Heritage Village-Livonia, 343 NLRB at 647 (policy prohibiting "abusive or profane" language upheld as lawful); Palms Hotel & Casino, 344 NLRB at 1367-68 (policy prohibiting conduct that is "injurious, offensive, threatening, intimidating, coercing, or interfering" upheld as lawful); *see also* Adtranz ABB Daimler-Benz Transp., 253 F.3d at 25-27 (work rule prohibiting use of "abusive or threatening language" upheld as lawful). Moreover, the provisions of the Policy are not rendered vague or ambiguous merely because the AGC asserts that they are. Indeed, it is immaterial and irrelevant that the AGC can "imagine[] horrible hypothetical situations (which, if true, might violate the Act) that have nothing much to do with the rule as written and enforced by the Company." *See* Aroostook County Regional Ophthalmology Center v. NLRB, 81 F.3d 209, 213 (D.C. Cir. 1996); *see also* Palms Hotel &Casino, 344 NLRB at 1368 ("We are simply unwilling to engage in … speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity….") Instead, the language of the Policy must be given a reasonable interpretation, based upon how GM's employees would understand the terms of the Policy. *See* Hyundai Am. Shipping Agency,

Inc., 357 NLRB No. 80, *slip op.* at 2 ("Given all of the circumstances, we find that employees would not reasonably construe the Respondent's rule against 'indulging in harmful gossip' to prohibit Section 7 activity."); Lutheran Heritage Village-Livonia, 343 NLRB at 647 ("A reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act."); University Medical Center, 335 F.3d at 1088-89 (applying "reasonable employee" standard). The terms "offensive, demeaning, abusive or inappropriate" are easily capable of being understood by employees, and reasonable employees reading these terms would understand that the Policy is intended to "ensure a civil and decent workplace" (Lutheran Heritage Village-Livonia, 343 NLRB at 647), prohibit "conduct tending to damage or discredit [GM's] reputation" (Tradesmen Int'l, 338 NLRB at 462), and discourage "incivility" (University Medical Center, 335 F. 3d at 1088).

In contrast, the AGC improperly advocates a "strained construction [of] the language." *See* Lafayette Park Hotel, 326 NLRB at 825. However, such an approach "would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable." Lutheran Heritage Village-Livonia, 343 NLRB at 647; s*ee also* ABB Daimler-Benz Transp., 253 F.3d at 26 ("[I]t is preposterous that employees are incapable of organizing a union or exercising their statutory rights under the NLRA without resort to abusive or threatening language."); Lafayette Park Hotel, 326 NLRB at 825 ("We are unwilling to place such a strained construction on the language ….")

Second, the AGC's argument that GM failed to provide any guidance on how these provisions of the Policy will be applied is simply not true. As the ALJ correctly held, the Social Media Policy "starts with the statement that it is a restatement of existing policy being applied in the social media context." (ALJD, p. 10) Further, the undisputed testimony adduced at the

March 15, 2012 hearing corroborated this finding. GM's Director of Social Media, Mary Henige ("Henige"), testified without contradiction that "*This is just one of many GM policies, and all GM's other policies apply*." (Tr. 60). Further, Henige explained the interpretation and application of the Social Media Policy as follows:

> We wanted employees to understand that all of GM's other policies still applied, but because of the prevalence of the web and mobile devices, that whether they're at work or they're not at work they can have access to postings, we wanted them to know that the same laws that we have from the FTC, the SEC, privacy issues, confidentiality and protecting GM business information all apply, and we also wanted to sensitize them to the fact that things really stay on the web forever, and that their conversations, it's not -- they're not private, that they're very visible or discoverable.

(Tr. 56).

In her Exceptions Brief, the AGC bemoans the fact that GM did not introduce any of its other rules and policies to clarify the scope of the Social Media Policy. (Exceptions Brief, pp. 14-15). The AGC's argument rings hollow in light of the transcript from the hearing, however, since the AGC repeatedly objected to GM's efforts to offer any evidence of the interpretation or application of the Policy outside the four corners of the Policy itself. (*See, e.g.*, Tr. 61-63, 73, 77-78, 94, 112, 117). Further, the AGC conveniently ignores the fact that the government bears the burden of proof to establish the existence of an unfair labor practice in the first instance. *See* Delchamps, Inc. v. NLRB, 588 F.2d 476, 478 (5th Cir. 1979) (declining to enforce Board order where General Counsel failed to satisfy burden of proof). Where the General Counsel fails to offer any evidence or witnesses, with the result that the evidence offered by the Respondent is essentially undisputed, the General Counsel simply has not carried her burden of proof. *See* Id.; *see also* NLRB v. Louis A. Weiss Memorial Hospital, 172 F.3d 432, 446 (7th Cir. 1999) (the "failure of General Counsel to create a factual record in no way supports a finding that General Counsel met its burden of proof").

In any event, the AGC's argument is contrary to law. GM cannot be expected to catalogue every potential circumstance in which the Social Media Policy might apply to Section 7 activity in the text of the Policy. *See, e.g.,* Lafayette Park Hotel, 326 NLRB at 826 ("[T]o find … this rule unlawful [would obligate Respondent] to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically would apply. Such an approach is neither reflective of the realities of the workplace nor compelled by Section 8(a)(1).") The Board recognizes that policies are drafted for laymen, not lawyers. Thus, a policy need not provide an exhaustive, or even a particularly nuanced, list of examples and exceptions in order to be lawful. *See* Lutheran Heritage Village-Livonia, 343 NLRB at 648 ("We will not require employers to anticipate and catalogue in their work rules every instance . . . of abusive or profane language . . . ."). If an employee would not reasonably read the policy as prohibiting Section 7 activity, the inquiry is at an end and the policy is lawful. *See, e.g.*, Tradesmen Int'l, 338 NLRB at 461 ("Reading this language in context, employees would recognize that it was intended to reach conduct similar to the examples given in the rule, not conduct protected by the Act"); Lafayette Park Hotel, 326 NLRB at 825 ("[W]e find that employees would not reasonably conclude that the rule as written prohibits Section 7 activity.").

Third, the AGC has utterly failed to demonstrate that a reasonable employee would understand GM's Social Media Policy "to proscribe a wide spectrum of communications, including protected criticisms of GM's labor policies or treatment of employees." Indeed, on its face, the Social Media Policy is not intended to apply to activities protected by Section 7 of the Act. As the ALJ noted in his decision, the Social Media Policy specifically states that it "will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act." (ALJD, p. 9). Given this clear disclaimer, there is simply no

way for employees to construe the language of the Social Media Policy as depriving them of their rights to engage in protected concerted activities. Further, GM's Director of Social Media explained that GM wanted employees to utilize social media tools to communicate with each other about matters affecting their jobs, explaining that "*General Motors really wants employees to feel that … they could engage internally and ask questions of each other and our leaders*." (Tr. 39-40). Such communication is at the core of Section 7 of the Act. At bottom, the AGC offered no evidence establishing that the Social Media Policy was intended to chill such activities, or limit the ability of GM employees to communicate with each other regarding wages, hours and working conditions through social media or any other communications medium. The AGC's argument is based upon pure speculation, not facts. However, as the Board cogently observed in Palms Hotel & Casino, 344 NLRB at 1368, the NLRB is "simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it."

Fourth, the cases cited by the AGC in support of her Exception No. 9 are distinguishable and inapposite. In particular, the AGC cites the Board's decisions in Claremont Resort and Spa, 344 NLRB 832 (2005), Lafayette Park Hotel, 326 NLRB 824 (1998), Flamingo Hilton-Laughlin, 330 NLRB 287 (1999) and Southern Maryland Hospital Center, 293 NLRB 1029 (1989), in support of reversal of the ALJ's conclusions with respect to the provisions of GM's Social Media Policy regarding "*Treat*[ing] *Everyone with Respect*," However, in each of the cases cited by the AGC, the rule in question was specifically directed at employee criticisms of management or other employees. *See, e.g.*, Claremont Resort and Spa, 344 NLRB at 832 (Rule provided that "Negative conversations about associates and/or managers are in violation of our Standards of

Conduct that may result in disciplinary action."); Lafayette Park Hotel, 326 NLRB at 826 (Rule prohibited "Making false, vicious, profane or malicious statements toward or concerning Lafayette Park Hotel or any of its employees."); Flamingo Hilton-Laughlin, 330 NLRB at 287 (Rule prohibited "false, vicious, profane or malicious statements regarding another employee, guest, patron, or the Hotel itself."); Southern Maryland Hospital Center, 293 NLRB at 1222 (Rule prohibited "Malicious gossip or derogatory attacks on fellow employees, patients, physicians or hospital representatives….") Unlike the rules at issue in the cases cited by the AGC, the provisions of the Social Media Policy do not prohibit negative or derogatory statements about GM or GM's management, nor are the provisions designed to prohibit social media discussions about matters pertaining to wages, hours and working conditions. Obviously, legitimate criticism of the Company and its management is protected by Section 7 of the Act. However, in situations such as this, where the Policy does not specifically limit such criticism, the NLRB will not presume that the Policy prohibits such activities simply because the language limits *could be read* to do so. *See, e.g.*, Palms Hotel & Casino, 344 NLRB at 1368 ("[W]here, as here, the rule *does not* address Section 7 activity, the mere fact that it could be read in that fashion will not establish its illegality."); Lutheran Heritage Village-Livonia, 343 NLRB at 647 ("Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.") Because the provisions of GM's Social Media Policy do not single out protected activity (which distinguishes the Policy from the cases cited by the AGC), the NLRB should not -- and cannot -- construe the language of the Policy to apply to such activities in the absence of any actual enforcement against employees' protected activities. Accordingly, Exception No. 9 must be overruled.

2. The ALJ Correctly Held that the Social Media Policy's Rules Regarding "Friending" Co-Workers and "Inappropriate" Communications on Social Media Do Not Violate the Act (Exception 10).

GM's Social Media Policy contains a provision entitled "*Personal References on Social Media Sites*" that cautions employees about making on-line connections with other employees on social media sites. (Policy, p. 3) The ALJ correctly found that the language in this provision regarding "friending" co-workers was "in the nature of advice or of a suggestion, and does not require an employee to engage in any kind of action." As such, the ALJ held that these provisions of the Policy are lawful because they constitute only an admonition and contain "no reference to possible discipline or required actions." (ALJD, p. 8). The ALJ's decision is clearly correct in this regard, and the AGC's Exception No. 10 is meritless.

The Social Media Policy provides the following advice to employees using social media:

> **PERSONAL REFERENCES ON SOCIAL MEDIA SITES**
>
> There are no "secrets" on the Internet. The web is public, and it has a long memory. Even information you may think you have protected as "private" on some social media sites may be accessed by others -- courts have recently ordered Facebook to provide access to subscribers' private data under some circumstances as part of the discovery process in lawsuits. Consider everything you post to the Internet as potentially discoverable by anyone. Keep in mind that technology makes it (1) virtually impossible to completely "delete" something you have done online; and (2) incredibly easy to send what you have done to millions of other viewers. Make sure you will have no regrets about what you said or did online if a reporter, a relative or your manager were to view it.
>
> Think carefully about "friending" co-workers (including leaders or direct reports) on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate on-line, and what you say in your personal social media channels could become a concern in the workplace.

(Policy, p. 3).

As can be seen from the plain language of the Policy, the cautionary language in this provision is merely advisory, and not compulsory. Under such circumstances, this language in the Policy cannot be deemed to be disciplinary in nature and cannot be construed to inhibit protected activities. The law is well-settled that an employment policy does not violate the Act where its provisions are merely "didactic" rather than "coercive." Salon/ Spa at Boro, Inc., 356 NLRB No. 69, *slip op*. at 13 (2010); Baker Concrete Construction, Inc., 341 NLRB 598, 598 (2004) (holding that supervisor who warned employee to stay away from union proponents or "you [could] have trouble" did not violate the Act because "it is far from clear that [the supervisor] was saying that Respondent could be the source of that trouble."). Indeed, absent some explicit statement by an employer that it will impose consequences on an employee for use of social media, mere warnings of potential consequences resulting from social media usage will not violate the Act. Salon/ Spa at Boro, Inc., 356 NLRB No. 69, *slip op.* at 13.

At its core, the provision in the Social Media Policy's suggesting that employees "think carefully" about friending co-workers on external social media sites does not constitute a rule with disciplinary consequences. Indeed, the Social Media Policy does not contemplate, or even suggest, any discipline for employees who do not "think carefully" before friending co-workers on external social media sites. While the Social Media Policy could not be clearer on this point, the AGC nevertheless argues that the "friending" provision contains a disciplinary component because it must "be read in the context of the Policy's earlier general warning that 'Failure to stay within these guidelines may lead to disciplinary actions.'" (AGC Exceptions Brief, p. 17). This argument is obviously a stretch.

Indeed, contrary to the AGC's arguments, the Social Media Policy contains no general disciplinary warning. To the contrary, the only language in the entire Social Media Policy that

contemplates any disciplinary action does not appear in the general provisions of the Policy but rather appears in a distinct section entitled "*Use Good Judgment About What You Share and How You Share*," which applies only to rules limiting dissemination of non-public company information. (Policy, p. 1). The disciplinary provision in the Social Media Policy is not "general" in nature. Specifically, it is not set forth in a provision of general applicability, nor does it state that it should be applied to other portions of the Policy.[14] Moreover, since the Policy only suggests that employees "*think*" about who they friend, and does not actually state that employees *are prohibited* from friending certain people, the AGC's assertions that this provision in the Policy is *disciplinary* and *coercive* in nature simply do not hold water. Indeed, there is no reasonable interpretation of the Policy that would facilitate the AGC's strained conclusion that the provision regarding discipline for disseminating non-public information could apply to the provision suggesting that employees think carefully about who they "friend" on social media sites. *See* Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1191-92 (D.C. Cir. 2000) (provision following a specific section should not be read to apply generally).

In addition, the AGC's conclusory and unsupported claim that the "friending" provision "discourages communications among co-workers and thereby interferes with Section 7 Activity" is purely speculative and finds no support in the factual record or the law. (AGC Exceptions Brief, p. 17). The "friending" provision does not state that employees cannot be friends with their co-workers on external social media sites. Further, the "friending" provision imposes no limitations on the substance or content of any communications. Nor does the "friending"

[14] In this regard, the provision regarding friending on social media stands in stark contrast with the disclaimer provision. Indeed, the disclaimer provision clearly states that the *entire* Social Media Policy will be administered in compliance with laws. (Policy, p. 3). If the Company had intended for the provision providing for discipline for disseminating non-public information to apply to other parts of the Policy, then GM would have used similarly broad language to express such an intent. *See* Mohave Elec. Coop., 206 F.3d at 1191-92.

provision suggest that employees must refrain from making protected statements or engaging in protected concerted activity under the Act. Under such circumstances, the "friending" provision does not violate Section 7 of the Act. *See* Salon/ Spa at Boro, Inc., 356 NLRB No. 69, *slip op.* at 13 (merely didactic policies do not violate the Act).

The AGC's Exception with respect to the portion of the provision dealing with "inappropriate" communications on social media is equally misplaced. The AGC argues that the Company should have presented evidence regarding its rules pertaining to inappropriate workplace conduct in order to clarify the provision in the Social Media Policy stating that "[c]ommunications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate on-line." (AGC Exceptions Brief, p. 17). In so doing, the AGC again improperly attempts to shift her burden of proof to the Company by suggesting that the Company bears the burden of proving that its policies pertaining to workplace activities are lawful. (Id.). This is entirely contrary to well-established law. *See* Delchamps, 588 F.2d at 478 (declining to enforce Board order where General Counsel failed to satisfy burden of proof).

Since she cannot meet her burden of proving that GM's other corporate policies unlawfully define the term "inappropriate," the AGC cannot prove that the Social Media Policy's sister provisions are unlawful. While she notes that the Policy references other Company policies that govern workplace activities, the AGC fails to acknowledge that these policies have never been found to be unlawful. Indeed, the AGC does not even suggest that they are unlawful. Nor could she. Under such circumstances, and absent any evidence otherwise, the policies governing workplace conduct must be presumed to be lawful for purposes of analyzing the provision. Since the provision does not contemplate discipline beyond the Company's presumptively lawful external policies, the AGC has not carried her burden of proving that the

"friending" provision violates the Act. *See* Timekeeping Systems, Inc., 323 NLRB 244, 248 (1997) (applying traditional Section 7 analysis to resolve the question of whether electronic communications constitute protected activity).

No reasonable interpretation of a rule prohibiting "inappropriate" behavior would yield the result that such a prohibition restricts activity protected under Section 7. Indeed, GM acknowledges that protected concerted activity is not "inappropriate" behavior. Rather, such activity has been protected by statute for several decades. *See* 29 U.S.C. § 157. Moreover, there is no reason to conclude that the Company's employees covered by the Act -- most of whom are represented by labor unions -- would construe a Policy prohibiting "inappropriate" behavior as prohibiting protected concerted activities. *See* Ark Las Vegas Restaurant Corp., 335 NLRB at 1291 ("The real question is whether any employee, guided by knowledgeable union officials, would harbor uncertainty over the scope of the rule. . . . The Union is undoubtedly well aware of the limits of protected conduct."). For this reason as well, Exception 10 lacks merit and must therefore be rejected.

3. The ALJ Correctly Concluded that the Provision Instructing Employees to "Report Any Unusual or Inappropriate Internet or Social Media Activity to the System Administrator" Does Not Violate the Act (Exception 11).

GM's Social Media Policy contains a specific section that discusses use of GM's proprietary social media channel or "*Internal Social Media*." (Policy, p. 3). This section reads as follows:

> *Social media tools for GM employees are intended for business use*. They should not be used to discuss non-business related issues like politics or religion, or for generally personal conversations.
>
> While social media tools may encourage casual language and abbreviated terms, avoid terms that could create confusion or be misunderstood.

> Report any unusual or inappropriate internal social media activity to the system administrator. (emphasis added)

(Id.) In her Exception No. 11, the AGC asserts that this section of the Policy violates Section 8(a)(1) of the Act because this "encourag[es] employees to report to management the protected activities of other employees." (AGC Exceptions Brief, p. 18).

The AGC's argument is clearly based upon a selective misreading of the Company's Social Media Policy. Because the Company's internal social media site is a work tool, GM has adopted different rules regarding employee use. As explained by the Company's Director of Social Media, GM employees create "private groups" on the Company's Internal Social Media channel for facilitating projects between and among remote cities. (Tr. 40). Further, GM permits the creation of public groups on Internal Social Media channels for employees to connect with one another about matters of general interest. (Id. at 40-41). However, under the Policy, the Internal Social Media "should not be used to discuss non-business issues like politics or religion, or for generally personal conversations." (Policy, p. 3). Among the provisions applicable to the Internal Social Media channel is a request that employees "[r]eport any unusual or inappropriate internal social media activity to the system administrator." (Id.) Based upon the language and context of this requirement, the ALJ correctly concluded that this section of the Policy pertaining to Internal Social Media is lawful. (ALJD, p. 9).

The AGC's argument that this provision requires "employees to report to management the protected activities of other employees" is not supported by the language of the Policy or the evidentiary record. (AGC Exceptions Brief, p. 18).

First, as can be seen from the clear and unambiguous language of the Policy, the reporting requirement applies *only* to Internal Social Media channels. Under the Policy, Internal Social Media channels are work tools. Under well-established Board precedent, GM -- as the

owner of the internal social media tools in question -- has a legitimate business interest in maintaining the efficient operation of these tools, protecting against the dissemination of its trade secrets and other proprietary information through these tools, and guarding against the propagation of viruses that could cripple GM's operations. *See* Register-Guard, 351 NLRB 1110, 1114 (2007). For this reason, GM has legitimate reasons for requesting that users of these tools report any "unusual or inappropriate internal social media activity to the system administrator." (Policy, p. 3).

Second, this is not a case where GM has improperly singled out union-related communications for reporting. As can be seen from the face of the Policy, the "business use" only rule applies to Internal Social Media. In fact, GM is not asking employees to report *Section 7 activity* to the system administrator. Rather, GM is asking employees to report unusual or inappropriate activity on its internal social media tools to the system administrator. It is plain from the language and context of the Policy that this reporting requirement is not generally applicable to all forms of social media activity, and that the Company is not encouraging employees to report the activities of other employees for disciplinary purposes. Instead, GM's reporting requirement is intended to foster optimal use of internal social media tools for legitimate business purposes.

Third, the cases cited by the AGC in support of Exception No. 11 fall well wide of the mark. Each and every case cited by the AGC involves employer attempts to surveil solicitation of union authorization cards or other union organizing activity. *See* Greenfield Die & Mfg. Corp., 327 NLRB 237, 237-38 (1998) (adopting the ALJ's finding that an employer violated the Act by interrogating an employee regarding his distribution of union authorization cards on company time); Bloomington-Normal Seating Co., 339 NLRB 191, 191 n.2 (2003) (employer's

instruction to "let [him] know about it" if employees were "threatened or harassed about signing a union card" was unlawful); Tawas Indus., Inc., 336 NLRB 318, 322 (2001) (employer's request to employees to report "threats and coercion" during union organizing campaign was unlawful); Eastern Maine Medical Center, 277 NLRB 1374, 1375 (1985) (employer's statement urging employees to report if they were "harassed . . . into signing cards" was overly broad and unlawful) (internal quotations omitted). Given that such activities are not permitted on GM's Internal Social Media channels, there is no possibility that employees will be required to inform on others engaging in such activities.

Fourth, the AGC's attempt to seize on the terms "unusual" and "inappropriate" to establish an ambiguity in the language that might call into question the legality of the Social Media Policy fares no better than the AGC's other specious arguments. The terms "inappropriate" and "unusual" are not vague and ambiguous when read in context. These terms refer to internal social media activities that are inconsistent with the business purposes of these tools, such as discussions about "politics or religion" or "personal conversations." (Policy, p. 3). No reasonable employee would understand this rule to apply to Section 7 activity. Indeed, Section 7 activity is not even contemplated by the provision. Additionally, it is patently unreasonable to conclude that a heavily unionized workforce such as GM's would consider Section 7 activities to be "unusual" or "inappropriate." *See* Ark Las Vegas Restaurant Corp., 335 NLRB at 1291 (union-represented employees and unions are "undoubtedly well aware of the limits of protected conduct"). Moreover, the applicable case law counsels against the AGC's overly suspicious interpretation of the words "unusual" and "inappropriate." *See* Adtranz ABB Daimler-Benz Transp., 253 F.3d at 28 (warning against "parsing workplace rules too closely in a search for ambiguity that could limit protected activity"). The AGC's attempt to seize upon

these two words without regard for their context to create an alleged ambiguity in the Policy is clearly improper. For all of these reasons, Exception No. 11 must be rejected.

C. The ALJ Correctly Held that the Provision Instructing Employees Not to "incorporate GM logos, trademarks…in your posts" Does Not Violate the Act (Exception 8).

In its efforts to assure lawful use of social media communication tools, GM has promulgated requirements in its Social Media Policy that restrict the use of the Company's "logos, trademarks and other assets." (Policy, pp. 1-2). The provisions pertaining to use of logos, trademarks and other Company assets are included in the section of the Social Media Policy entitled "*Use Good Judgment About What You Share and How You Share*," portions of which were held to be unlawful by the ALJ. (ALJD, pp. 5-6). The relevant language in this section of the Policy reads as follows:

> - Remember that you are personally responsible for complying with the rules of use or terms and conditions of any social media site where you participate, and that they differ from site to site. Be familiar with them BEFORE you engage. You have the "right" to express yourself, but that doesn't mean there aren't consequences.
>
> - Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure than any photos, music, video or other content that you are sharing is legally sharable or that you have the owner's permission. If you are unsure, you should not use.
>
> - Get permission before posting photos, video, quotes or personal information of anyone other than you online. Hurt feelings, damages relationships and lawsuits for legal violations and breaches of contract are potential consequences of bringing others into an online setting without their permission.
>
> - Do not incorporate GM logos, trademarks or other assets in your posts. (It's okay to refer others to GM's official sites, however, especially if you want to clear up misconceptions you discover on the web.)

(Policy, pp. 1-2).

Given the inherent commercial value of intellectual property rights and the broad legal protections afforded such rights under federal law, the ALJ correctly held that the provisions in GM's Social Media Policy restricting unauthorized use of its logos, trademarks, and related intellectual property, as well as the intellectual property rights of others, are entirely lawful. In reaching this conclusion, the ALJ carefully articulated all of the factors relevant to his analysis, including GM's status as a heavily unionized company, the non-discriminatory nature of the provision, the lack of any anti-union animus by GM, and the Company's *bona fide* interests in protecting the integrity of its valuable intellectual property. (ALJD, p. 7). Based upon these factors, and in light of the Board's decision in Flamingo Hilton-Laughlin, 330 NLRB at 292-93, the ALJ correctly concluded that the Company's legitimate business interests outweighed any arguable interest that GM employees might have in utilizing GM logos or trademarks in their social media communications. (Id.)

In Exception No. 8, the AGC contends that these provisions of GM's Social Media Policy are overly broad and violate Section 8(a)(1) of the Act. (AGC Exceptions Brief, pp. 9-14). The AGC asserts four (4) arguments in support of this Exception: (i) the provisions of GM's Social Media Policy prohibiting use of the Company's logo, trademarks and other intellectual property rights can reasonably be read to forbid activities protected by Section 7 of the Act, (ii) GM's legitimate business interests in protecting its logo, trademarks and other intellectual property rights are not implicated by employee use in connection with Section 7 activities, (iii) employees would construe the restriction on use of GM's logo, trademarks and other intellectual property rights to prohibit posting of videos, picket signs or leaflets that bear GM's logo on social media sites, and (iv) GM has not provided sufficient explanation to employees regarding how Section 7

rights will be accommodated under the Policy. (Id.) The AGC's arguments are unpersuasive, and the ALJ's conclusions with respect to these provisions of the Social Media Policy must be affirmed.

First, the AGC assumes -- in the absence of any NLRB authority supporting this assumption -- that employees have a Section 7 right to utilize social media sites in connection with protected activities. However, it is well-established that the AGC bears the burden of showing that the maintenance of a policy would reasonably chill the exercise of employees' Section 7 rights. *See* Lafayette Park Hotel, 326 NLRB at 826. As more fully explained in GM's Exceptions and Brief in Support, the NLRB has never recognized any protected right to utilize social media for union organizing or any other activity protected by Section 7 of the Act. Further, the AGC has offered no evidence or authority -- whatsoever -- establishing that employees' rights to communicate on social media sites would be impaired if employees were not permitted to utilize their employer's intellectual property. Given that the Policy encourages employees to identify themselves as GM employees when utilizing social media, there can be no argument that the these provisions in GM's Social Media Policy prevent employees from discussing their employment in social media postings. (Policy, p. 1) ("The fact that you are a GM employee or representative may be relevant to conversations about out company or industry, even if you are not an official GM social media spokesperson. You need to disclose that you work for GM and the nature of your position … whenever you participate in these discussions.") The AGC provides no explanation for why the use of GM's intellectual property rights is necessary for employee use of social media.

Second, even if the Board had recognized employee rights to utilize social media tools for activities protected by Section 7 of the NLRA, there is no support for the AGC's contention that

employees have a protected right to utilize the Company's logo, trademark or other intellectual property in connection with their social media activities. In support of her argument that employees have an unfettered right to utilize the intellectual property of their employer on social media sites, the AGC cites two cases: Sullivan, Long & Hagerty, 303 NLRB 1007, 1013 (1991), *enf'd mem.*, 976 F.2d 743 (11th Cir. 1992), and Pepsi-Cola Bottling Co., 301 NLRB 1008, 1019-20 (1991), *enf'd mem.*, 953 F.2d 638 (4th Cir. 1992). Both of these cases are completely inapposite. The Board's decision in Sullivan, Long & Hagerty did not involve intellectual property rights or employer policies of any kind. Instead, the relevant portion of the ALJ's decision in that case involved an employer's failure to rehire an employee based upon his engagement in numerous concerted activities, including carrying a tape recorder in connection with an investigation by the U.S. Department of Labor. Sullivan, Long & Hagerty, 303 NLRB at 1013. This case clearly does not support the AGC's claim that employees have an unfettered right to utilize intellectual property belonging to their employer. The AGC also cites the Board's decision in Pepsi-Cola Bottling Co. In that case, the employer implemented a new rule prohibiting employees from wearing their company uniforms during non-working time outside the plant, as well as prohibiting display of union insignia on company uniforms, in response to union organizing at the employer's facility. Pepsi-Cola Bottling Co., 301 NLRB at 1020. Again, the case in distinguishable, since there is no allegation that GM implemented its Social Media Policy in response to any union organizing. Further, in Pepsi-Cola Bottling Co., the ALJ noted that the employer did "not provid[e] any business reason which would outweigh the Section 7 right of its employees to engage in union activity in a uniform bearing a product identification." Id. In this case, the AGC conceded that GM "has a proprietary interest in its trademarked assets"

(AGC Exceptions Brief, p. 10) -- another fact that distinguishes this case from Pepsi-Cola Bottling Co.

Third, the AGC's efforts to distinguish the Board's decision in Flamingo Hilton-Laughlin, 330 NLRB 287 (1999) -- which the ALJ relied upon in his decision -- are utterly unpersuasive. (ALJD, p. 7). In Flamingo Hilton-Laughlin, the Board held that an employer did not violate the Act by promulgating a rule prohibiting employees from wearing their uniform bearing the employer's identification while off the employer's premises. 330 NLRB at 287. In reaching this conclusion, the ALJ distinguished Pepsi-Cola Bottling Co. based upon the fact that the uniform rule in Pepsi-Cola Bottling Co. was implemented in response to union organizing. Id. at 292-93. Further, the ALJ held that, because "the rule applied to all off duty activities" and that there was no "evidence of any unlawful application of the rule," the employer could lawfully prohibit the wearing of employer-branded uniforms off-site. Id. at 293. The AGC attempts to distinguish Flamingo Hilton-Laughlin by asserting that the case "did not address the issue of logos or trademarks at all." (AGC Exceptions Brief, p. 13). However, there is no doubt that the uniforms at issue in Flamingo Hilton-Laughlin contained insignia sufficient to identify the employer. The AGC then suggests that Pepsi-Cola Bottling Co. "specifically upheld the right to wear company logos and trademarks." (Id.) This contention clearly overstates the case. In Pepsi-Cola Bottling Co., the ALJ concluded that the employer's uniform rule was an "excessive impediment to employee union activity," based upon evidence that the uniform rule was promulgated only after the employer became aware of union organizing, and where there was evidence of discriminatory enforcement. 301 NLRB at 1019-20. Nowhere in the decision does the Board or the ALJ recognize a general right of employees to utilize logos and trademarks while engaging in Section 7 activity. Obviously, the context surrounding the promulgation of a policy or work rule is an

essential component in the Board's analysis of the policy or rule. *See* Lafayette Park Hotel, 326 NLRB at 826 ("[T]here is no evidence that the Respondent promulgated the rule in response to union or protected concerted activity....") Given the absence of any union activity or discrimination surrounding the implementation of GM's Social Media Policy, the Board's decision in Pepsi-Cola Bottling Co. is not controlling.

Fourth, unlike the situation in Pepsi-Cola Bottling Co., it is undisputed that GM has articulated a legitimate business reason for implementation of its Social Media Policy. As the AGC reluctantly concedes, GM 's logos and trademarks represent valuable assets, which GM must actively protect in order to retain its position in a highly competitive marketplace. In fact, at the hearing, the AGC *stipulated* to the value of these intangible assets and the Company's obvious interest in protecting its intellectual property rights. (*See* Tr. 122) ("[W]e could stipulate that GM has an interest in protecting its trademarks, just like every other company. I'll offer that stipulation.") An unequivocal stipulation is clearly binding on the AGC; indeed, she cannot re-litigate this point after the hearing. *See* Kroger Co., 211 NLRB 363, 364 (1974) ("[A] stipulation is conclusive on the party making it and prohibits any further dispute of the stipulated fact by that party of use of any evidence to disprove or contradict it.")

Even without the AGC's stipulation however, GM amply demonstrated legitimate business reasons for protecting its intellectual property rights in its Social Media Policy. At the March 15, 2012 hearing, GM's Chief Trademark Counsel, Timothy Gorbatoff ("Gorbatoff"), testified without contradiction that the Company runs the risk of forfeiting its valuable intellectual property rights if they are not adequately policed. (*See* Tr. 127) ("[I]f you don't enforce your trademarks . . . you will lose rights to those trademarks because at that point people no longer associate it with a particular source.") Significantly, Gorbatoff's undisputed testimony

is completely consistent with existing trademark case law, which holds that the policing efforts of a trademark owner are a key component in retaining such rights. *See* Coca-Cola Co. v. Purdy, 382 F.3d 774 (8th Cir. 2004) (noting the trademark owner's policing efforts); *see also* Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. 80 (Dec. Comm'r Pat. 1950) (trademark owner's lack of policing led to cancellation of trademark). Gorbatoff emphasized that the Company has not enforced -- and will not enforce -- its intellectual property rights in a way that would restrain employees' Section 7 rights. (*See* Tr. 127) ("[W]e would never step in the way . . . of an employee being able to say, 'I work for GM and I've got an issue here.'") This testimony completely undermines the AGC's speculative arguments suggesting that employees' Section 7 rights would be impaired by the application of the Social Media Policy.

Fifth, much of the AGC's arguments in support of Exception No. 8 are based upon a misunderstanding of applicable intellectual property laws. The AGC argues in her brief that there is no likelihood of confusion stemming from employees' purported non-commercial uses of the GM logo or the Company's trademarks.[15] (AGC Exceptions Brief, pp. 10-11). This argument fails for a number of reasons. For one thing, the ALJ did not even rely on the likelihood of confusion test in concluding that the logos and trademark provision in the Social Media Policy is lawful. (ALJD, pp. 6-7). Instead, the ALJ relied in part on the fact that GM had "offered a *bona fide* reason for [the] promulgation" of the provision. (Id. at 7). In addition, the testimony of Gorbatoff makes clear that GM's *bona fide* reasons for implementing the logos and trademark provisions are not limited to the likelihood of confusion. Instead, as established by

[15] The AGC's brief cites a copyright case (Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)) and the Copyright Act, 17 U.S.C. § 107, apparently in support of the putative proposition that employees' use of the GM logos or trademarks would fall within the fair use exception to copyright infringement. Aside from the fact that copyright law is not at issue here, the AGC's brief fails to note that the fair use exception for trademarks is located in a different portion of the Code and governed by a significantly different standard. *See* 15 U.S.C. § 1115(b)(4).

Gorbatoff's unrebutted testimony, GM must police its intellectual property interests for a host of reasons, including but not limited to the possibility of dilution, tarnishment, and genericide.[16] (*See* Tr. 127) (offering a number of reasons why large corporations, including GM, are vigilant about protecting their trademarks and related intellectual property rights). Federal courts have continued to recognize that employers have a lawful interest in preventing the dilution or impairment of their intellectual property. *See* NLRB v. Starbucks Coffee Co., 679 F.3d 70, 78 (2d Cir. 2012) (employer "has a legitimate, recognized managerial interest[]" in preventing its employees from diluting the company's recognizable image) (internal quotations omitted). For all of these reasons, the AGC's likelihood of confusion argument fails on its face.

Sixth, the AGC once again improperly attempts to shift the burden of proof to GM to demonstrate that the Company has provided "clarification or explanation" regarding the rules pertaining to the use of logos and trademarks in social media communications to its employees. (AGC Exceptions Brief, p. 12). This is wholly improper and ignores the AGC's burden of proof, which she failed to discharge at the hearing. Proving that the mere maintenance of policy is unlawful is, by necessity, a difficult burden to meet. The AGC failed to satisfy this burden at the hearing and she cannot satisfy this burden now. Contrary to the AGC's unsupported assertions, the Company has no duty to, among other things, (1) "include all of the nuances" within the logos and trademarks provision itself or (2) "issue . . . reports about the intellectual property matters it considers." (AGC Exceptions Brief, pp. 11-12). As explained in detail above, these assertions simply have no support in the case law and merely serve to confuse the issue. *See* Lafayette Park Hotel, 326 NLRB at 826 (AGC bears the burden of proof to show that the

[16] Recently, the Acting General Counsel expressly recognized an employer's lawful interest in preventing employees from posting messages that "could reasonably be attributed to the Employer . . . ." GC OPERATIONS MEMORANDUM OM 12-59, at 17 (May 30, 2012). The Acting General Counsel offers no reason why this logic should not extend to the logos and trademarks provision at issue in this case.

maintenance of a policy violates Section 8(a)(1)). The unrebutted evidence offered by the Company at the hearing shows that (1) GM did not promulgate the rule in response to union activity, and (2) GM did not harbor any anti-union animus. The ALJ correctly noted these factors in his opinion and upheld the logos and trademarks provision as lawful. (ALJD, p. 7). For all of these reasons, the AGC's Exception No. 8 must be rejected.

D. The ALJ Did Not Commit Reversible Error in His Findings of Fact and Evidentiary Rulings (Exceptions 1-7).

In her Exceptions, the AGC objects to several of the ALJ's credibility findings and evidentiary rulings. In particular, Exceptions 1 through 7 articulate a variety of dubious objections to the ALJ's factual findings and evidentiary rulings. None of these Exceptions has any merit. Indeed, many of the Exceptions are foreclosed by the applicable rules of evidence, the AGC's conduct during the hearing, the language of the ALJ's decision, or for other obvious reasons.

First, the AGC argues that the ALJ erred by failing to find that the record does not contain any evidence showing that GM offered additional guidance or clarification to its employees with respect to the interpretation and application of the Social Media Policy. (AGC Exception No. 1). This argument misses the mark on several levels. As an initial matter, it ignores the plain language of the Social Media Policy itself, which states that it is "really a summary of existing GM policies and how they apply to GM employees" and expressly refers employees to the "Corporate Policy Manual." (Policy, p. 1). Moreover, when read holistically, as the law demands, the Social Media Policy is clear and does not require additional explanations or examples. *See* Lafayette Park Hotel, 326 NLRB at 826 (policies require a "common sense formulation" and need not "set forth an exhaustive[] comprehensive rule anticipating any and all circumstances"). Tellingly, the AGC offers no support for her implicit assertion that a lawful

policy cannot incorporate other policies by reference. Finally, the ALJ's decision does not assume, explicitly or implicitly, that employees *had* received additional guidance or clarification with respect to the Social Media Policy, so the AGC's objection on this point is immaterial. Accordingly, there was simply no need for the ALJ to make any factual finding on this point.

Second, the AGC contends that the ALJ improperly failed to make a factual finding to the effect that GM has not provided guidance to employees with respect to the portions of the Social Media Policy pertaining to intellectual property. This argument fails for many of the same reasons as the AGC's other arguments. Again, the AGC ignores the fact that GM has no obligation whatsoever to promulgate a policy setting forth "exhaustively comprehensive rule[s] anticipating any and all circumstances" in which the rules might apply. Lafayette Park Hotel, 326 NLRB at 826. Moreover, this argument represents yet another improper attempt by the AGC to shift the burden of proof to GM. As explained above, the burden remains with the AGC at all times to prove that the Social Media Policy is facially invalid. Id. (explaining that the General Counsel has the burden of proof). The policy states on its face that it will not be construed to interfere with employees' Section 7 rights. (Policy, p. 3). Additionally, Gorbatoff testified at the hearing that the Company does not enforce the intellectual property provisions of the Social Media Policy in a manner that would chill employees' exercise of their Section 7 rights. (Tr. 127) ("[W]e would never step in the way . . . of an employee being able to say, 'I work for GM and I've got an issue here.'") The AGC utterly failed to rebut this testimony by offering her own witnesses or evidence. Her argument must therefore be rejected.

Third, the AGC erroneously argues that the ALJ should have considered the Social Media Policy "in a vacuum," without regard for any external evidence or any of the other GM policies referenced in the Policy. (AGC Exception No. 3). However, the AGC neither explains nor

offers any support for the proposition that the Policy must be read "in a vacuum" or that other GM policies referenced in the disputed Policy cannot provide context and reference points for the application of the Policy. Similarly, there is no legal requirement that the Company explain employees' Section 7 rights on the face of a policy rather than in an external notice. *See* Lafayette Park Hotel, 326 NLRB at 826. To the contrary, the NLRB has recently engaged in rulemaking that would require employers to *post* such notices -- not to incorporate them into Company policies. *See* PROPOSED RULES GOVERNING NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT, 75 Fed. Reg. 80410, 80412 (Dec. 22, 2010) (*to be codified at* 29 C.F.R. pt. 104). As a result, the AGC's argument on this point must be rejected.

Fourth, the AGC objects to the ALJ's conclusion that the facts of the case are undisputed. (AGC Exception No. 4). In support of this questionable Exception, the AGC identifies testimony by GM witnesses that, in her view, should not have been accorded weight by the ALJ. (Id.) However, the AGC proffered no evidence of her own to contradict the testimony of these witnesses or demonstrated any reason why the ALJ should not have credited these witnesses' statements. The AGC cannot cure her failure to present critical documentary evidence or witnesses at the hearing through the filing of post-hearing Exceptions. Moreover, to the extent that the ALJ credited the testimony of GM's witnesses, the AGC fails to show by a "clear preponderance of all the relevant evidence" that the ALJ's decision to do so was incorrect. *See* T.E. Briggs Construction Co., 349 NLRB 671, 671 n.1 (2007) (ALJ's credibility findings are affirmed unless a "clear preponderance of all the relevant evidence" shows the findings were incorrect) (*citing* Standard Dry Wall Products, 91 NLRB 544 (1950), *enf'd,* 188 F.2d 362 (3d Cir. 1951)). Further, the Board has made clear that it will not *presume* an improper motive on the part of the employer when reviewing facially neutral employment policies. *See, e.g.*, Palms

Hotel & Casino, 344 NLRB at 1368 (NLRB declines to "attribute[e] to employers an intent to interfere with employee rights, in order to divine ambiguities that will render such rules unlawful."); Lutheran Heritage Home-Livonia, 343 NLRB at 648 ("We see no justification for concluding that employees will interpret the rule unreasonably … or to presume that the Respondent will apply it in that manner.") Because the AGC cannot satisfy this heavy burden, this Exception must be rejected.

Fifth, the AGC objects to Gorbatoff's testimony that GM does not enforce the logo and trademarks provision of its Social Media Policy in a way that would unlawfully restrict employees' Section 7 rights. (AGC Exception Nos. 5, 6). The AGC asserts that the testimony "was speculative, conclusionary, and self-serving" and improperly solicited by the ALJ. (AGC Exception 5). The AGC also asserts an unspecified "due process" violation based upon the fact that the ALJ questioned some of GM's witnesses.[17] However, the ALJ is permitted to question witnesses in order to clarify the record and regulate the course of the hearing, which to that point had been marred by the AGC's numerous objections.[18] Indeed, it was completely proper for the ALJ to question Gorbatoff. *See* Indianapolis Glove Co., 88 NLRB 986, 987 (1950) ("It is appropriate also for the [ALJ] to direct the [trial] so that it may be confined to material issues and conducted with all expeditiousness consonant with due process."); *see also* Hall Indus., 293 NLRB 785, 785 n.1 (1989) (ALJ may properly question witnesses directly); Teamsters Local 722 (Kasper Trucking), 314 NLRB 1016, 1017 (1994) (ALJ is not required to withhold questioning of witnesses until the parties have finished examining them).

[17] It is unclear how the AGC's "due process" rights were allegedly violated. The AGC received a full and fair hearing in front of a neutral decision maker. Evidentiary rulings that are adverse to a particular party do not amount to a due process violation. *See* Am. Cast Iron Pipe Co. v. NLRB, 600 F.2d 132, 138 (8th Cir. 1979).

[18] Counsel for the AGC objected thirty-one (31) times during the hearing. (*See* Tr. 30, 33, 44-45, 49-51, 53-56, 58, 60-62, 73, 93-95, 97-98, 104-05, 112-14, 117-18, 120, 122, 132-33).

Moreover, the testimony solicited was not self-serving or speculative, but rather based on Gorbatoff's personal knowledge and significant experience as GM's chief trademark counsel. To the extent that she disagreed with Gorbatoff's testimony, the AGC could have attempted to rebut this testimony by calling her own witnesses or introducing evidence of her own. Although she carries the burden of proof in this case, the AGC chose not do so. The AGC must accept the consequences of this tactical decision. Accordingly, Exceptions 5 and 6 must be rejected in their entirety.

Finally, the AGC objects to the ALJ's purported reliance on Respondent's Exhibit 1, consisting of a selection of postings on GM's internal social media site, asserting that the ALJ failed to rule on the AGC's hearsay objection in his decision. (AGC Exception No. 7). This exception is flawed in several respects. As an initial matter, the AGC waived her hearsay objection by failing to assert it when the exhibit was offered and admitted into evidence. (Tr. 42); *see also* U.S. Ecology Corp., 331 NLRB 223, 225 (2000) (untimely hearsay objections are waived). Moreover, the AGC's hearsay objection is irrelevant, as the exhibit was neither offered, nor relied upon by the ALJ in his decision, for the truth of the matter asserted therein. *See* Wisconsin Steel Indus., 318 NLRB 212, 214 (1995) (a statement not offered for the truth of the matter asserted is not hearsay). And, even if the exhibit were hearsay, which it is not, it would be admissible under the business records exception because they are kept in the regular course of business by GM. (Tr. 88-89); *see also* FED. R. EVID. 803(6). As a result, Exception No. 7 has no merit and must be rejected.

E. The ALJ's Recommended Remedial Notice Is Vague and Ambiguous.

In Exception No. 12, the AGC asserts that the ALJ's recommended remedial notice is impermissibly vague and ambiguous. The remedial notice states, in pertinent part, that:

> WE WILL NOT maintain provisions in our social media policy, including confidentiality rules, that unlawfully restrict you in the exercise of the rights listed above, including your ability to discuss wages, hours, and other terms and conditions of employment.
>
> …
>
> WE WILL rescind provisions in our social media policy, including confidentiality rules, that unlawfully restrict you in the exercise of the rights listed above, including your ability to discuss wages, hours, and other terms and conditions of employment.

(ALJD, App'x).

As an initial matter, for the reasons discussed in the Company's (1) post-hearing brief, (2) brief in support of its Exceptions to the ALJ's Order, and (3) this brief, a remedial notice is improper because GM's Social Media Policy does not violate the Act. GM further contends that the ALJ's order and remedies are unwarranted because GM's Social Media Policy does not unlawfully restrict employees' Section 7 rights. In the interest of brevity, GM incorporates by reference its arguments contained in this brief, along with those contained in its post-hearing brief and Exceptions brief.

Nevertheless, even if such a notice were warranted (which it is not), the ALJ's proposed order and remedial notice are impermissibly vague and ambiguous. The Board has explained that a remedial notice must be simple, clear, and precise in outlining the scope of relief. *See* Ishikawa Gasket America, Inc., 337 NLRB 175, 176 (2001) ("[S]implicity and clarity are certainly not inconsistent with precision."). Here, as the AGC observes in her Exceptions Brief, the ALJ's remedial notice fails to communicate with clarity and precision which particular provisions are unlawful. Instead, the remedial notice refers only to "provisions in [the] social media policy, including confidentiality rules." Such vague language does not put GM or its employees on notice of which provisions are invalid, or how GM might comply with its obligations pursuant to the injunction. Arguably, several provisions in the Social Media Policy

could be construed as pertaining to confidentiality. It is GM's position that the recommended remedial notice should be rescinded in its entirety. In any event, at minimum, the notice should be modified in order to more accurately identify the specific provisions enjoined by the ALJ's order. *See* L.D. Kichler Co., 335 NLRB 1427, 1427 n.2 (2001) (modifying the ALJ's vague and imprecise order).

While GM believes that none of the remedies contained in the order are warranted, certain remedies are unsupportable as a matter of law, even if one assumes for the purposes of argument that parts of the Policy are facially invalid (which they are not). In particular, the ALJ's award of back pay and discipline rescission order are improper. The AGC offered no evidence whatsoever at the hearing that any GM employee, current or former, has been disciplined pursuant to any provision of the Social Media Policy. Moreover, the AGC explicitly conceded at the hearing that her challenge was a facial challenge, and not an as-applied challenge. (Tr. 70) ("The General Counsel has chosen to proceed on one theory . . . ."). It is well-established that back pay and related remedies are appropriate only where an employee has actually been subject to some form of discrimination. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). Under these facts, an award of back pay and a discipline rescission order are speculative remedies, which are completely unsupported by the extant record. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900 (1984) (speculative back pay awards are prohibited). The AGC has not even asserted that any employee has been discriminated against, let alone carried her burden of proof on this issue. Accordingly, the ALJ's order and remedies must be vacated, in light of their complete lack of any evidentiary support.

IV. **Conclusion**

GM's Social Media Policy is a lawful effort to provide guidance to its employees regarding the appropriate use of emerging communications technologies, and not an undue

infringement on the Section 7 rights of employees. Both at the March 15, 2012 hearing and in her Exceptions, the AGC argues that the Policy should be dissected into its constituent parts and that each provision should be individually scrutinized with a jaundiced eye to assure that employee rights are not impaired. Further, the AGC urges the Board to substitute presumption and conjecture for evidence and reason in evaluating GM's Social Media Policy. The approach advocated by the AGC is improper and contrary to law. The Social Media Policy must be read on a holistic basis and in context to determine whether it passes muster under Section 8(a)(1) of the Act. Although the ALJ was persuaded at the hearing to review the provisions of the Company's Social Media Policy on a piecemeal basis, the ALJ nevertheless concluded that the substantial majority of the Policy is lawful and does not impose an undue burden on employees' statutory rights. The AGC now complains that the ALJ did not go far enough. However, there is no basis for overturning the ALJ's conclusions with respect to the matters at issue in the AGC's Exceptions. His decisions with respect to these matters are well-grounded in law and amply supported by record evidence. Accordingly, the AGC's Exceptions must be rejected in their entirety.

Date: September 5, 2012

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CERTIFICATE OF SERVICE

I, Onika C. Celestine, hereby certify that on September 5, 2012, I caused copies of Respondent's Brief in Response to the Exceptions of Counsel for the Acting General Counsel to the Administrative Law Judge's Decision, in ***General Motors, LLC, Case 07-CA-053570***, to be served upon all parties of record, by electronic transmission, as follows:

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